SHILPA J DOSHI

v.

JITENDRA CHHOTALAL DOSHI

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: S4-33-567-2001]
26 SEPTEMBER 2003

FAMILY LAW: *Matrimonial property - No contribution - Property inherited by husband - Whether wife entitled to division of property upon divorce - Law Reform (Marriage and Divorce) Act 1976, s. 76*

FAMILY LAW: *Financial obligation - Maintenance - Wife self-supporting - Whether wife entitled to maintenance upon divorce - Whether children entitled to maintenance until reaching 18 years of age or upon leaving for higher education*

There were three applications before the court by the petitioner wife, namely, a petition for divorce; a summons in chambers to set aside an injunction order against the petitioner restraining her from removing her daughter out of the jurisdiction of the court; and an originating summons praying for custody of the two children of the marriage and maintenance amongst other things. The issues for consideration were whether the petitioner was entitled to properties owned by the respondent husband, and whether she was entitled to maintenance for herself.

Held (allowing petition and summons in chambers, dismissing originating summons):

[1] The respondent did not complete his schooling and had no professional qualifications. His expenses had been borne by his late father during his father's lifetime. After his father's demise, it was the respondent's family that bore his expenses and continued to do so until today. The petitioner on the other hand had tertiary education, possessed a degree and had her own business selling sarees and jewellery as well as conducting yoga classes from which she earned approximately RM4,000-RM7,000 per month. (p 119 c-e)

[2] The respondent had promptly made monthly maintenance of RM7,000 to the petitioner and the children since 1 August 2002 pursuant to two earlier consent orders. There was no order before the said consent orders ordering the respondent to pay the petitioner any maintenance. As such, there was

no question of any outstanding arrears. It followed that the petitioner was not entitled to her claim for arrears of maintenance. Further, the petitioner's conduct since commencing proceedings did not entitle her to such a claim. In the case of *SS v. HJK* it was decided that under s. 78 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the crucial factor in the assessment of the amount of maintenance is the need of the party to be maintained. Maintenance will only be payable if the spouse making the claim is incapable of self-support.

[3] The petitioner could not claim the monies that were in the joint account of herself and the respondent because evidence showed that those monies were held on behalf of the respondent's mother. Further, the petitioner had given an undertaking not to make any claims on the said monies. The said monies had since reverted back to the respondent's father's estate as per his mother's instructions and were no longer in the said account. Further, the fact that the petitioner did not make any withdrawal from the said account was itself proof that she knew that the said monies were not matrimonial assets.

[4] The petitioner's claim that she cared for the family, the children and the matrimonial home was refuted by the respondent that there were maids throughout the marriage and that the petitioner was busy doing business and conducting yoga classes. The petitioner had failed to provide a single receipt for any monies spent towards the family. Therefore, s. 114(g) of the Evidence Act 1950 applied to invoke an adverse inference on the petitioner's failure to produce proof of her contribution.

[5] The petitioner failed to specify the contribution she made towards the acquisition of the properties she referred to as matrimonial properties ('the said properties'). The said properties, although placed in the respondent's name, were not purchased by the respondent or the petitioner but by the respondent's late father. The respondent and the petitioner did not contribute to the said properties. Further, the will and the memorandum of understanding of the respondent's father clearly showed that it was never his intention that the petitioner or the children enjoy his assets, monies or properties. In fact, in 1995 the respondent's father had severed all ties with the petitioner. In the absence of any proof of the petitioner's contribution to the said properties, the said properties were not matrimonial properties and the petitioner was not entitled to any share therein. The said properties being inherited and by way of gift fell outside the scope of s. 76 of the Act and therefore could not be subjected to any division before this court.

[Decree nisi granted, respondent given sole guardianship and custody of daughter with care and control to petitioner; respondent to pay maintenance of RM2000 each for both children, prayer for division of matrimonial assets dismissed, ex parte injunction set aside; daughter's international passport to be deposited in court until she reaches age of majority.]

Case(s) referred to:
Ang Teng Siong v. Lee Su Min [2000] 3 SLR 55 ***(refd)***
Lim Bee Cheng v. Christopher Lee Joo Peng [1996] 2 CLJ 697 HC ***(refd)***
Lim Keng Hwa v. Tan Han Chuah [1996] 3 SLR 593 ***(refd)***
Lim Thian Kiat v. Teresa Haesook Lim & Anor [1997] 5 CLJ 358 ***(refd)***
N(f) v. C [1997] 4 CLJ Supp 258 HC ***(refd)***
Ng Kim Seng v. Kok Mew Leng [1992] 2 SLR 872 ***(refd)***
Re Heng Peng Hoo & Anor [1989] 3 MLJ 103 ***(refd)***
Shi Fang v. Koh Pee Huat [1996] 2 SLR 221 ***(refd)***
SS v. HJK (Divorce Petition No: 33-102-90) (Unreported) ***(refd)***
Thevathasan v. Thevathasan [1960] 26 MLJ 255 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Law Reform (Marriage and Divorce) Act 1976, ss. 76, 78, 86
Penal Code, s. 323

For the petitioner wife - T Gunaseelan; M/s Gunaseelan & Assocs
For the respondent husband - Sri Saraswathy Devi (V Alagendra); M/s N Saraswathy Devi

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:
There are two applications in the instant case. Both applications are made by the petitioner wife. Enclosure (1) is a petition for divorce dated 18 May 2001. Enclosure (75) is a summons in chambers praying for setting aside of the injunction *ex parte* dated 18 October 2000 and for the return of the International Passport of Nisha Jitendra Doshi held by the respondent husband. The summons in chambers is dated 3 September 2003. By consent both these applications are heard together today. By agreement of parties the Originating Summons No. S4-24-2546-00 dated 19 September 2000 filed by the petitioner wife is also heard together today.

The matters that fall for consideration in encl. (1) are as follows:

(i) the dissolution of the marriage;

(ii) the issue as to who is entitled to Guardianship, Custody, Care and Control of the Children and as to who is entitled to access to the children as well as the nature of the access allowed;

(iii) Whether or not there are any matrimonial properties acquired by the parties during the marriage by their joint efforts and the petitioner's contribution to the properties;

(iv) Whether or not on the present facts there ought to be an order for the division of property as prayed for by the petitioner;

(v) Whether or not the petitioner is entitled to any maintenance from the respondent which involves consideration of the respondent's present income and earnings, the conduct of the petitioner and her present income and earnings and whether or not the petitioner has provided sufficient proof of her expense and need for maintenance;

(vi) Whether or not the petitioner is entitled to any arrears of maintenance;

(vii) Whether or not maintenance is payable for the children and the age until which, children are entitled to claim maintenance.

The petitioner had initially filed the Originating Summons No. S4-24-2546-00 inter alia praying for:

(1) Custody, Care and Control of the Children, Biren Jitendra Doshi and Nisha Jitendra Doshi;

(2) Maintenance of RM28,600 per month to be paid to the petitioner for herself and the children;

(3) That documents belonging to the children and the petitioner including the daughter's passport be returned to her.

In the said originating summons proceedings, several applications were filed for consideration of the court, *inter alia* wherein an injunction order dated 18 October 2000 restraining the petitioner from removing Nisha Jitendra Doshi out of the jurisdiction of this court was granted by the court, *ex parte* and further confirmed after hearing both parties, *inter partes*. In encl. (1) the petitioner seek *inter alia* the following prayers:

(a) That the marriage be dissolved;

(b) That she be given guardianship, custody, care and control of the children;

(c) That the respondent pay her a sum of RM20,000 as maintenance;

(d) That the respondent pay the arrears of maintenance;

(e) That the respondent bear the medical and dental expenses of the children;

(f) That the respondent bear the educational expenses of the children;

(g) That an order be given for the division of matrimonial assets;

(h) That the respondent bears the cost of the Petition.

It is observed that the respondent had on 20 August 2001 filed an answer to the petition *inter alia* responding to the prayers sought by the petitioner as follows:

(a) At para. 20 of the answer to the petition the respondent stated as follows:

(i) The respondent concedes to para. (a) of the said petition;

(ii) The respondent prays for Guardianship of the Children whilst the respondent concedes to the petitioner taking Custody, Care and Control of the Children provided the respondent is given weekly access to Biren Jitendra Doshi and Nisha Jitendra Doshi;

(iii) The respondent refers to paras. (c), (d), (e) and (f) and states that the respondent is currently not working and the living expenses of the respondent have been and continue to be borne by the respondent's family members. The respondent's family members have however refused to bear the expenses of the petitioner and the children due to obnoxious and malicious conduct of the petitioner since March 2000 and since the respondent has not been given the right of access to both his children, Biren and Nisha;

(iv) The respondent refers to para. (g) and states that there are no matrimonial assets (as explained in para. 15 above) to be divided and further that there is no property jointly owned by the petitioner and the respondent.

(b) At para. 21 of the answer to the petition, the respondent prayed *inter alia* for the following orders:

(i) That the said marriage be dissolved;

(ii) That the respondent be given legal guardianship of the Children, Biren Jitendra Doshi and Nisha Jitendra Doshi;

(iii) That prayers (c), (d), (e) and (f) of the petition be dismissed on the grounds that the respondent is currently unemployed and is being supported by his family;

(iv) That prayer (g) be dismissed on the grounds that there are no matrimonial assets.

It is also observed that the parties had by Interlocutory Consent Orders obtained in July 2002 agreed to the following:

(1) That the respondent be given access to the Children, Biren and Nisha Doshi from 10am to 8pm every Sunday in the presence of their grandmother Indira Doshi;

(2) That collectively, maintenance of the sum of RM7,000 per month be paid by the respondent's family to the petitioner, Biren Doshi and Nisha Doshi. And it is hereby noted that the respondent's family has to date complied with the Consent Orders.

It is hereby noted that as to prayer (a) of the petition the respondent concedes that the marriage be dissolved and therefore pray for an order in terms of prayer (a) of the petition and that the *decree nisi* be made absolute immediately, in view of the fact that the proceedings initially were commenced by the petitioner in September 2000 and all the documents that have since been filed are proof enough that this marriage has irretrievably broken down. As to prayer (b) of the petition the respondent prays for Guardianship and Custody of Nisha, as Biren as attained the age of 18 years and the respondent concedes that care and control be given to the petitioner. As to the petitioner's prayer (e) of the petition, the respondent concedes to the same in so far as Nisha is concerned as Biren has attained the age of 18 years and ought no longer to be entitled to any maintenance. As to the petitioner's prayer (f) the respondent states that the education expenses of the children from the time they started schooling were throughout borne by the respondent's family, and even at present a sum of approximately RM100,000 is being paid for the children's school fees and concedes that the respondent only bear the educational costs of the children till their 1st degree. As to the petitioner's prayer (h) the respondent prays that

the petitioner, who commenced both proceedings ie, the originating summons and the petition herein, be ordered to bear the costs of both proceedings due to the voluminous and repetitious affidavits and applications filed by the petitioner in both proceedings over the past three years and the false averments contained in several of the petitioner's affidavits had caused the respondent severe stress and hardship as each time the respondent was forced to go through more than 20 years of documents to prove that matters averred by the petitioner were false.

It is also hereby noted that the respondent did not complete his schooling and has no professional qualification. During his father's lifetime, the respondent's expenses were borne by the respondent's father, and since his demise in 1996, it was the respondent's family that bore the expenses of the respondent, and continue to do so till today. (See para. 3 of the respondent's affidavit – the respondent is not working, he left school after Form 3, which fact is fully within the petitioner's knowledge). (See para. 12.3 of the respondent's affidavit – exh. 17 Income Tax letter confirming that for the year 2001 there was no income tax payable as there were no earnings). It is also noted that the petitioner has in her own affidavit filed in the earlier proceedings *vide* Originating Summons No. S4-24-2546-2000 affirmed several affidavits, conceding to the fact that the Respondent does not work. The petitioner on the other hand has had tertiary education, possesses a degree and since the 1980s run her own business selling sarees and jewellery as well as conducting yoga classes, from which she earned approximately RM4,000-RM7,000 per month (p. 255-p. 306 Bundle of Documents). It is submitted that to date the petitioner still conducts yoga classes and earns an income. (See para. 4 of the respondent's affidavit – exh. JCD3 confirms the petitioner is a degree holder and has completed a course in Automatic data Processing Concepts. Paragraph 7 of the petitioner's affidavit – the petitioner denied earning RM3,000 a month but did not deny teaching Yoga during the marriage. The petitioner further denied doing business of selling sarees and jewellery from India despite having admitted selling sarees in her earlier affidavits. Paragraph 8 of the respondent's further affidavit – exh. JCD5A – the letter from the respondent's father to the petitioner states "I request you to refund me all sums due to me for the goods you have taken from me and sold outside and not paid me back till this day." However, the petitioner had in her affidavits filed in the OS proceedings claimed to be a housewife, and after proof of her earning an income was furnished, admitted that she did earn her own income. Petitioner's affidavit dated 13 November 2000:

16.1 I state that I was never allowed access to the family finances. The Respondent did place monies in some joint accounts. For a short period I was given a RM3,000 allowance was made to ask for it and sign a voucher just as the maid and driver.

16.2 I state that if I did have control over any of the family finances, I would have been able to leave the home with more than only my two suitcases.

Petitioner's affidavit dated 20 November 2000:

7. ... My father-in-law controlled every aspect of our lives and his permission had to be sought for everything. He disallowed my family from visiting me, neither were my children to visit them.

I am compelled to make a note that in exh. JCD4 of the respondent's affidavit of Income and Assets dated 7 July 2003 at p. 9 shows that the total average income collected by the petitioner from the yoga classes amounts to RM308,000 from January 1994 to May 2000. In exh. JCD6 of the respondent's affidavit of Income and Assets dated 7 July 2003 pp. 14 to 21. The website of the petitioner's yoga classes shows that she caters for 400 students who are constantly taking classes and according to the website, the petitioner conducts 22 classes in a week. The income from the 400 students should be at the average rate of RM120 per student per month ie, RM48,000 per month x 12 months which equals to RM576,000 per annum. To date the petitioner has not truthfully declared her income. The petitioner does yoga full time and she had collected all these monies but has not contributed one cent towards the marriage. Secondly the petitioner was doing saree business. Please see exh. JCD5 of the respondent's affidavit of Income and Assets dated 7 July 2003 at pp. 10 to 13. The petitioner has earned a total average nett income of RM360,000 from her saree business from January 1988 to December 1995. In exh. JCD5 of the respondent's affidavit of Income and Assets dated 7 July 2003 is a letter postmarked 4 April 1996 wherein the petitioner instructs the respondent to conduct her saree business on her behalf. The income received from this business was solely kept by the petitioner and never used to contribute in any manner whatsoever towards the marriage. Again it is noted that from the time the petitioner and the respondent were married, the respondent's father gave the respondent a monthly allowance of RM3,000 per month and the petitioner took that whole sum away. (Please refer to Divorce Petition para. 17.6(c) at p. 10 where the petitioner admits receiving such a sum and para. 4 of the respondent's affidavit dated 22 September 2003.) In calculating the RM3,000 per month given to the petitioner from 1984 to 2000, approximately RM576,000 has been given by the respondent's family to the petitioner. Despite her admission of receiving the sum of RM3,000 the petitioner has failed to disclose what she did with the money. Moreover, the petitioner did not at any time,

use the monies she received for the family expenses, the RM3,000 per month was kept for her sole use. This again is admitted by the petitioner in her affidavits dated 3 November 2000 and 20 November 2000 filed in the originating summons proceedings. In exh. JCD5A of the respondent's Supplementary Affidavit dated 14 July 2003 at pp. 19 to 22 wherein the respondent's father had severed all relationship in any manner whatsoever with the petitioner which included the respondent's father officially declaring that he is no longer the petitioner's father-in-law. Also evident in exh. JCD5A of respondent's supplementary affidavit dated 14 July 2003 is the respondent's father's official notice to the petitioner's parents that he has severed all relationships with the petitioner and her family as such the respondent's father will no longer be responsible for any acts or deeds of the petitioner. In para. 8 and 9 of the respondent's affidavit dated 22 September 2003, it is observed that almost every year since the marriage, the petitioner used to travel to USA and on a number of occasions she traveled to Singapore, India and Australia for holidays and each time the petitioner used to take substantial sums of money such as US$20,000 from Malaysia with her. At present the respondent's family have been paying the following sums for the maintenance of the petitioner and the children and the education of the children (see para. 17, 17.4(a)-(d) respondent's affidavit):

(i) Maintenance per year at RM7,000 per month – (RM7,000 x 12 months)	RM	84,000
(ii) Children's School Fees (approx.)	RM	100,000
(iii) Children's Medical Insurance	RM	1,987.10
(iv) Miscellaneous expenses (school uniforms, flight tickets for school activities, school stationery, sports equipment and others) (approx.)	RM	5,000
(v) Children's Dental Expenses	RM	5,000
Approximate Total (yearly)	RM	195,987.10
Approximate Total (monthly)	RM	16,332.26

Over and above these payments borne by the respondent's family (excluding the RM7,000) maintenance, the petitioner has prayed for monthly maintenance of RM20,000 and has reproduced details of her expenses as contained in para. 15 of the petitioner's affidavit and exh. SJD2, item 1-23. As regards to exh. SJD2, I find that no receipts for the expenses listed out items 1-23 have been produced by the petitioner, in her affidavit. There are only four people including

the maid living in the apartment, and all of them are vegetarians, as such item 11 for RM2,500 per month for marketing, item 12 for local outings and entertainment RM2,000 per month are exorbitant as there are no receipts to prove these expenses are in actual fact incurred, or for that matter even incurred by the petitioner every month. As for the other expenses listed out in items 1-23, as stated earlier, there are no receipts to prove that the petitioner incurs the said expenses, and furthermore, the petitioner has failed to specify, which of these expenses she actually pays for, bearing in mind that she runs her own business which earns a lucrative and substantial income. I think it is unfair to impose upon the respondent who himself depends on the finances of his family, and further to impose on the respondent's family, the exorbitant monthly expenses of the petitioner and the children, over and above what is already being paid by them which amounts to approximately RM16,332.26 a month. In the case of *Thevathasan v. Thevathasan* [1960] 26 MLJ 255, it is held, "the learned magistrate was wrong in not taking into consideration the potential earning power of the respondent and therefore the maintenance should be reduced ..."

As to the arrears of maintenance claimed I am of the opinion that the petitioner is not entitled to claim the arrears of maintenance for the following reasons. By the Consent Orders dated 22 July 2002 and 25 July 2002, the respondent commenced payment of RM7,000 monthly maintenance on 1 August 2002 to the petitioner and the children, which payments have been made promptly and no outstanding arrears exist. There is no Order prior to the said Consent Orders, ordering the respondent to pay the petitioner any maintenance, as such there is no question of any outstanding arrears to be claimed by the petitioner and the present facts fall outside the ambit of s. 86 of the Law Reform (Marriage and Divorce) Act 1976. I think the petitioner's conduct since commencing proceedings in September 2000 does not entitle her to claim arrears of maintenance. I observe that in June 2000 the petitioner on the pretext of taking the children to the USA for a holiday enrolled Biren in Hackley School, New York and left him in the care of her family there. In September 2000 the petitioner had obtained an Interim Protection Order (exhibited as exh. JCD4A of the respondent's further affidavit) against the respondent restraining him from going anywhere near the daughter, Nisha, when there was no allegation that the respondent had in any way abused Nisha. It is observed that it was the petitioner who took Nisha and left the house in the absence of the respondent who had moved out temporarily to live with his mother after the said Interim Protection Order was served on the respondent. I was made aware in submission that for several months after commencing proceedings, the respondent did not even know the whereabouts of Nisha as the petitioner had made an application

to the High Court so that she need not disclose her whereabouts. During the period the respondent was kept away from and denied access to the children, the petitioner had subjected their son to a psychiatric evaluation wherein several false allegations of abuse by the respondent were made, several letters from the children were produced making false allegations that the respondent had abused and been violent and was an alcoholic. The petitioner only agreed to allow the respondent to see Nisha provided it was supervised by her counsel, and even then the petitioner had caused Nisha not to come and see the respondent, making all sorts of allegations against him. In July 2002, when the respondent's family agreed to pay the petitioner and the daughter's maintenance of RM5,000 did the petitioner agree to enter into a Consent Order giving the respondent access to Nisha, provided it was done in the presence of his mother. For two years the respondent was denied all access and communications with his son, Biren not even through telephone calls, by keeping him in the USA with her family and refusing to bring him back to Malaysia. At that time, the petitioner was not caring for Biren, he was placed with her family, and returned to Kuala Lumpur only in 2002 after the respondent's family agreed to pay maintenance of RM2,000 for Biren and he returned suffering from ADD syndrome which required psychological treatment/therapy. From June 2000 to August 2002, the petitioner had refused to bring him back during the holidays. (See the respondent's affidavit dated 11 September 2003, para. 6 and 7 of the respondent's further affidavit and exh. JCD2A therein, and the transcripts of telephone conversations between the respondent and Biren annexed as exh. JCD01A of the respondent's reply affidavit (2)). It is noted that the fact that for two years the petitioner prevented and denied the respondent access to the children, even through telephone calls, and her conduct in influencing the children into making false allegations against the respondent. The fact that the petitioner lodged several false police reports against the respondent causing him to be charged in the Magistrate's Court under s. 323 of the Penal Code, which police reports were self serving to create a case for herself before this court, to support her extortionate demands for maintenance. As such I am compelled to take into consideration all matters stated above as well as the contents of the respondent's affidavit and the respondent's further affidavit. In the case of *SS v. HJK* Divorce Petition No. 33-102-90 High Court (Unreported), Justice Shankar held, "under s. 78 of the 1976 Act, the crucial factor in the assessment of the amount of maintenance is the need of the party to be maintained. Maintenance will only be payable if the spouse making the claim, is incapable of self-support."

As to the petitioner's prayer (g) that there be a division of matrimonial assets, I am referred to the two statutory declarations of the respondent's sister and brother:

(a) Respondent's Sister Bina Chhotalal Stevenson's Statutory Declaration

Reference is made to Bina Chhotalal Stevenson's Statutory Declaration at exh. JCD22 of the respondent's affidavit of Income and Assets dated 7 July 2003 at pp. 235 to 243 of the bundle of documents. Here the respondent's sister has declared on oath that the petitioner has not contributed directly or indirectly to the respondent's family and had not contributed anything and rendered no service as a wife, mother and daughter-in-law to the Doshi family. Further the respondent's sister has stated that at no time was the petitioner allowed to see or talk to the respondent's father prior to his death, as the respondent's father refused to see or talk to her due to her constant cruelty and abuse to the respondent's father and the respondent's family by the petitioner and the petitioner's family. The respondent's sister further states that she was told by the respondent's father prior to his death that he did not want to have any relationship whatsoever with the petitioner and had at no time did the petitioner make peace with the respondent's father prior to his death and was not allowed to come anywhere close to the respondent's father. The respondent's sister states in her statutory declaration that the petitioner had brainwashed the respondent's two children against him whereby he was deprived of seeing his son Biren since June 2000 and further an Interim Protection Order (IPO) was issued in favour of the petitioner and the daughter which deprived the respondent from seeing his daughter since 2000. The respondent's sister further states as follows:

> I sincerely believe has been done by Shilpa maliciously to hurt my brother to an extent where he will meet the exorbitant demands of Shilpa in the matrimonial proceedings which are pending.

The respondent's sister has stated in para. 6 of her statutory declaration (see p. 240) that throughout the respondent's marriage there were maids and a driver looking after the family and the two children. The maid washed the family's clothes, washed and cleaned the house and cooked meals for them.

(b) Respondent's Brother Kiron Chhotalal Doshi's Statutory Declaration

Reference is made to Kiron Chhotalal Doshi's Statutory Declaration found in exh. JCD23 of the respondent's affidavit of Income and Assets dated 7 July 2003 at pp. 245 to 247 of the bundle of documents. The respondent's brother has stated as follows in para. 3:

> I state that at all material times, during the lifetime of my father up until his death, my father and Shilpa J. Doshi @ Shilpa Arvind Ghatalia constantly had arguments and Shilpa verbally abused my father and behaved selfishly, tending only to her needs and not that of the family.

At paras. 9 and 10 the respondent's brother statutory declaration states that the respondent's father gave strict instructions to the respondent and his family that none of his properties or his monies should be utilised or enjoyed by Shilpa or the children. Further the petitioner is not entitled to use or enjoy any of the property or monies that had been inherited by the respondent in accordance with the respondent's father's wishes.

It is observed that all assets placed in the name of the respondent, were not purchased by the respondent or the petitioner neither did the respondent and the petitioner contribute to the said properties through their monies, work or effort. These assets were assets acquired by the respondent's late father and details of the acquisition of the properties as stated at paras. 10 and 11 of the respondent's affidavit. As to the monies referred to in para. 10 of the respondent's affidavit it is observed that the monies were initially in the joint names of the respondent and his mother and subsequently when the respondent's mother's health deteriorated, she requested the petitioner and the respondent to hold the said sums in their joint names on behalf of the respondent's mother. It was for this reason the petitioner had given her irrevocable undertaking not to make claims to the assets and monies held in the respondent's name either solely or in joint names. The petitioner's letter of undertaking dated 15 October 1999 not to make any claims to the said monies is exhibited (see para. 10.4.3 of the respondent's affidavit and exh. JCD11(4) at p. 71 of the respondent's affidavit). I am of the opinion the recent denial of the petitioner of signing the said letter (para. 25 of the petitioner's affidavit dated 19 September 2003) ought to be dismissed as no such objection was raised when notice to include the said letters in the bundle of documents was given on 17 April 2002 to her former solicitors (exh. JCD1B of the respondent's affidavit dated 22 September 2003 refers). The said monies have since September 2000 reverted back to the respondent's father's estate, as per his mother's instructions and are no longer in the said Citibank Joint Account. In *Lim Thian Kiat v. Teresa Haesook Lim & Anor*. [1997] 5 CLJ 358, the court said:

> The respondent attempted to introduce extrinsic evidence to vary or contradict the terms of the written deed of separation, namely the clause concerning the full and final settlement of the respondent's claim of matrimonial assets. As no parol evidence is admissible under ss. 91 and 92 of the Evidence Act 1950, this principle of collateral agreement introduced by common law is now intended to circumvent this statutory provision.

And the fact that the petitioner did not at any time since 1999 to 2000 make any withdrawal from the said account in itself is proof that she knew that the said monies were not matrimonial assets.

As to the properties inherited by the respondent under his late father's will, I come to the conclusion from documentary evidence that the said properties were not and never were matrimonial properties and the petitioner has failed to furnish any proof whatsoever that the said properties are matrimonial properties. They have throughout remained inherited properties, and thus cannot be subjected to any division by this court. In *Lim Bee Cheng v. Christopher Lee Joo Peng* [1996] 2 CLJ 697, the court said:

> When dealing with an application under s. 76 of the Act, it was essential for the court to make a finding of fact on whether the said property was acquired by the joint efforts of the petitioner and respondent, and if so, to apply s. 76(1) and (2) of the Act; or whether the said property was acquired by the respondent by his sole effort, and if so, to apply s. 76(3) and (4) of the Act.

In *N(f) v. C* [1997] 4 CLJ Supp 258, the court said:

> The undivided share of the matrimonial asset derived from the respondent's deceased mother which was transmitted to the respondent in 1986 was not subject to division. The 1/2 share was a gift from the deceased mother rather than an asset acquired by both the petitioner and the respondent through joint effort in the form of money, property or work. A gift – even though acquired during the marriage – to one spouse only does not fall within the meaning of s. 76 of the Act. Thus, the petitioner's claim for this particular portion must fail (see pp. 8581 and 859A).

In *Re Heng Peng Hoo & Anor* [1989] 3 MLJ 103, the court said:

> After considering the entire evidence the court was satisfied that the property was not jointly acquired but was acquired by the sole effort of the respondent. The application under s. 76(1) of the Law Reform (Marriage and Divorce) Act 1976 therefore failed.

In *Ang Teng Siong v. Lee Su Min* [2000] 3 SLR 55, the court said:

> To a certain extent the above dictum has been overtaken by amendments to the Women's Charter (Cap 353) ('the Act') effected after Hoong Khai Soon's case was decided. The present s. 112 of the Act only applies to the division of those assets that constitute 'matrimonial assets' and by sub-s. (10) a matrimonial asset does not include any asset (not being a matrimonial home) that has been acquired by one party at any time by gift or inheritance and that has not been substantially improved during that marriage by the other party or by both. Now, therefore, if one party receives a gift during the marriage from a third party that gift cannot be divided as a matrimonial asset upon divorce unless it is the matrimonial home or has been improved by the other party or both. The owner of the gifted asset would have to show that it originated form the generosity of a third party in order to prevent it from being divided upon divorce.

In *Ng Kim Seng v. Kok Mew Leng* [1992] 2 SLR 872, the court said:

> The factors raised by the appellant were irrelevant to the question of division as they did not come within the factors listed in s. 106(2) of the Women's Charter …
>
> It is clear from these provisions that the fact that the wife had substantial assets is not a relevant factor which the court ought to take into account. It was not disputed that these assets were not matrimonial assets falling within s. 106. As for No. 127 sunset Way, which the wife held in trust for the children, that was provided by the wife's father as a gift to the children and the husband had made no contribution in respect of it.

To date, the petitioner has, in all affidavits filed thus far, failed to specify the contribution she made towards the acquisition of the properties she refers to as "matrimonial properties". I think the failure of her to state so is deemed to be an admission by her that she did not in any way contribute towards the properties she now calls "matrimonial properties". The petitioner has in para. 10 of the petitioner's affidavit stated that she contributed by caring for the family, the children and the matrimonial home – this is refuted by the evidence of the respondent which states that there were maids throughout the marriage, and the petitioner was busy doing business and conducting yoga classes which the petitioner admits in para. 11 of her affidavit. The petitioner has at para. 10 also confirmed that the household furniture, paintings and kitchen utensils were paid for by the respondent and not by her, but further states that she contributed through her little savings from the yoga classes. The petitioner has failed to provide a single receipt for any of the monies she spent on the family, the house, the renovations or improvements or any other contribution she made to the family. After the Interim Protection Order was served on the petitioner, the respondent had moved out and the petitioner had full access to all documents and receipts in the house, however, the petitioner still failed to adduce evidence to support her statements that she did make contribution. If indeed there were receipts to prove the petitioner's contribution to the family or the home, she should have produced the same. I therefore invoke the adverse inference under s. 114(g) of the Evidence Act 1950 on the petitioner's failure to produce proof of her contribution. As such the petitioner is not entitled to any of the properties including the property at No. 101 Jalan Bukit Pantai, as not only were these properties not acquired by her contributions, she did not in any way improve these properties, so as to cause their value to appreciate. Furthermore, the petitioner and the respondent had lived at four addresses during the marriage and that in itself is proof that the property at No. 101 Jalan Bukit Pantai was not the matrimonial home.

In *Shi Fang v. Koh Pee Huat* [1996] 2 SLR 221 (CA), the Court of Appeal said:

> (1) On the facts, there was no agreement, arrangement or understanding reached between the husband and the wife that the house was to be shared beneficially. There also had not been any representation by the husband to the wife that she would have such a share or any fact from which it could be inferred that there was a common understanding that she was to have a share in the house. There could, therefore, be no question of any reliance on her part (see p. 233B-c); *Lloyds Bank plc v. Rosset & Anor* [1991] 1 AC 107 and *Tan Thiam Loke v. Woon Swee Kheng Christina* [1992] 1 SLR 232 followed. *Ungurian v. Lesnoff & Ors.* [1990] Ch 206 distinguished.
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> (2) Since the house was acquired long before the marriage, if the wife was to be entitled to a share in the house, she had to rely on s. 106(5) of the Women's Charter. On the facts, none of the matters which she said she did, whether taken singly or together, could constitute a substantial improvement of the house. All the contributions assuming they had been made were *de minimis*. The wife was, therefore, not entitled to any share in the house (see pp. 233H-234A, D-E).

Reference is made to the will and the memorandum of understanding of the respondent's father, which clearly shows that it was never his intention that the petitioner or the children, enjoy his assets, monies or properties and had in 1995 severed all ties with the petitioner. See respondent's father's will (p. 213-216 bundle of documents), memorandum of understanding between the respondent and his father (p. 217-218 bundle of documents), and p. 91 exh. JCD5A respondent's further affidavit dated 14 July 2003 – father's letters to the petitioner and her family.

Therefore I come to the conclusion that in the absence of any proof of the petitioner's contribution to the said properties, the improvements to the said properties or the acquisition of the said properties, the said properties are not matrimonial assets and the petitioner is not entitled to any share to the properties set out in para. 11 of the respondent's affidavit and further, the said properties being inherited and gifted properties fall outside the scope of s. 76 of the Law Reform (Marriage and Divorce) Act 1976 and therefore cannot be subjected to any division before this court.

In conclusion it is my finding that the properties held in the name of the respondent were inherited and gifted properties that do not fall under s. 76 of the Law Reform (Marriage and Divorce) Act 1976. In *Lim Keng Hwa v. Tan Han Chuah* [1996] 3 SLR 593 the court said:

> The undivided half share in the property that was transferred to the husband by the father was a gift, and did not fall under s. 106 (see p. 598G-H). Similarly, as the $250,000 deposits made by the father in the husbands account were a gift in exchange for the half share in the property, it was not an asset acquired by the husband either (see p. 599B-C). But the partnership share held by the husband was acquired by him and falls for division under s. 106 of the Women's Charter.

Further the petitioner has failed to furnish any proof whatsoever to prove that the properties held in the respondent's name fall within the ambit of s. 76 of the Law Reform (Marriage and Divorce) Act 1976 and neither has the petitioner adduced any proof to substantiate her claims for maintenance. I think the principle established by the spirit and intention of s. 76 of the Act be followed as to hold otherwise would tantamount to this court setting a precedent for future litigants and will open the floodgates for future litigants to abuse the process of the court and look at marriage as a money making tool through the divorce process and thereby erase the sanctity of marriages. For these reasons I come to the following conclusions and decisions:

Lampiran (1):

(a) *Decree Nisi* is hereby granted, made absolute immediately;

(b) Respondent husband is given sole guardianship (and custody) of Nisha. Care and control of Nisha is given to petitioner wife with access to respondent husband every weekend and half of all holidays every year until she reaches 18;

(c) Respondent husband is to pay petitioner wife for the maintenance of Nisha RM2,000 per month until she reaches 18 or upon her leaving for higher education whichever come first;

Respondent husband is to pay maintenance of Biren RM2,000 per month until he reaches 18 or upon his leaving for higher education whichever comes first;

(d) Arrears of maintenance for petitioner wife is hereby dismissed;

(e) Respondent husband is to pay for the medical and dental costs of both children until they completed their higher education to first degree;

(f) Respondent husband is to bear for the cost of educating both the children either locally or overseas until they completed their first degree;

(g) Prayer (g) for division of matrimonial assets is hereby dismissed because it has not been proven the existence of any matrimonial assets during the marriage;

(h) There is no order to cost.

Lampiran (25):

(1) Injunction *ex parte* dated 18 October 2000 is hereby set aside;

(2) Respondent husband is to deposit the International Passport of Nisha to Court until Nisha reaches the age of majority. Either party can apply for the release of the said International Passport for the use of Nisha for a fixed duration after which the said International Passport is to be deposited back to court by the applicant. Such application is to be made *inter partes*;

(3) Each party bears its own cost.

Case S4-24-2546-00 is dismissed with cost.